No. 82-957

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated: January 7, 1983

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals correctly concluded that Eastern Microwave, Inc.'s intermediary retransmission of television signals is exempt under the carrier exemption of the Copyright Revision Act, 17 U.S.C. Section 111(a)(3).

[1] Newhouse Broadcasting Corporation is the parent corporation of respondent Eastern Microwave, Inc.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit has now been reported at 691 F.2d 125 (2d Cir. 1982) ("*Opinion*"). The decision of the United States District Court for the Northern District of New York appears at 534 F.Supp. 533 (N.D.N.Y. 1982).

COUNTERSTATEMENT OF THE CASE

Eastern Microwave, Inc. ("EMI") is licensed as a common carrier by the Federal Communications Commission ("FCC")

to deliver television signals to cable systems throughout the United States. Since 1965, EMI has operated a network of terrestrial microwave stations to pick up television signals, including WOR-TV, New York, New York, off-the-air[2] and retransmit them to cable television systems. Since 1979, EMI has also retransmitted WOR-TV to cable systems throughout the United States using a satellite transponder leased from RCA.

EMI delivers television signals at the express request of cable systems. The record is clear that EMI does not in any way alter the programming of the television signals it retransmits. In all cases, EMI serves as an intermediary between the transmitting television station and the receiving cable system. The cable operator, not EMI, brings the signal into subscribers' homes. Delivery of television signals by carriers is essential to the provision of distant television programming by cable operators to subscribers.

As a result of the Copyright Revision Act of 1976[3] ("the Act"), cable systems are granted a compulsory license to retransmit television programming to cable subscribers. 17 U.S.C. § 111. Under the Act, copyright owners have no right whatsoever to control cable operators' use of television programming.

Compulsory licensing substitutes for direct negotiation between cable operators and copyright owners because Congress concluded that such negotiations would be burdensome and would undermine an efficient system of cable retransmission of television signals. Cable operators pay the Copyright Office a statutory fee based upon cable revenues for the right to deliver distant signals to subscribers. Generally, a cable system's fee increases with the number of subscribers. The Copyright Royalty Tribunal distributes the royalty proceeds to copyright owners.

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[2] Currently, EMI delivers sixteen signals via its terrestrial microwave system.

[3] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (1976 & Supp. V 1981)).

Doubleday Sports, Inc. ("Doubleday") is the copyright owner of television broadcasts of the New York Mets' baseball games carried on WOR-TV. After Doubleday threatened to file suit claiming that EMI's retransmission of Mets' games constituted copyright infringement, EMI sought a declaratory ruling that, as an intermediary common carrier,[4] it qualified for the carrier exemption in Section 111(a)(3) of the Act.[5] Essentially, that exemption provides that a carrier is not liable for copyright infringement if it serves as a passive intermediary in delivering television signals to cable systems.

The Court of Appeals (per Markey, J., C.C.P.A., sitting by designation) carefully analyzed the legislative history and purposes of the Act and unanimously concluded that, on the facts of this case, EMI qualified for the carrier exemption.[6] Doubleday seeks review of that holding.

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[4] The FCC granted EMI common carrier status in *Eastern Microwave, Inc.*, 70 F.C.C.2d 2195 (1979).

[5] Section 111(a)(3) provides in pertinent part:

> Section 111. Limitations on exclusive rights: Secondary transmissions
>
> (a) Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—
>
> . . . .
>
> (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions . . . .

[6] In the proceeding below, EMI also argued that its retransmissions did not constitute a "public performance" of Doubleday's work. The Court of Appeals expressly concluded that it did not need to reach the public performance issue. *Opinion*, 691 F.2d at 127 n.5 (Pet. App. 5a). Doubleday's speculation on this point (Petition at 8) erroneously describes the Court of Appeals' ruling on that issue. *See Opinion*, 691 F.2d at 132 n.16 (Pet. App. 14a-15a).

REASONS FOR DENYING THE WRIT

This case presents no federal question requiring resolution by this Court. The Court of Appeals' decision comports with the Act's compulsory license scheme for cable television. Entities holding a copyright in distant, non-network programming will continue to receive royalties according to the Act's formula; common carriers will be able to serve an intermediary role; and cable systems will maintain service to subscribers. As a result, more systems will receive WOR-TV via EMI's retransmission, and more royalties will be paid for distribution to copyright owners, including Doubleday.

I. The Court Of Appeals' Decision Fits The Copyright Act's Structure And Policy

Doubleday argues that review is needed because the Court of Appeals upset Congress' "careful balance," the central element of which is the Act's preservation of a "substantial measure" of copyright owners' control over cable use of programming. Petition at 13. This is dramatic contrivance. Section 111's compulsory license scheme is specifically designed to deny copyright owners any control over programming on cable.[7] By enacting the compulsory license, Congress decreed that public interests other than those of the copyright owner must be considered. The Act's comprehensive structure permits cable systems to select distant signals for import without Doubleday's permission. In return, Doubleday's copyright royalties increase as more paying subscribers receive WOR-TV's programming.[8]

By affirming the carrier's intermediary role, the Court of Appeals' decision advances the Act's purposes, rather than

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[7] The Section is entitled "*Limitations* on exclusive rights: Secondary transmissions" (emphasis supplied).

[8] The royalty distribution process has already paid tens of millions of dollars to copyright owners, refuting Doubleday's claim that the value of its copyright "will deteriorate to insignificance." Petition at 7. *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982), *aff'g* 45 Fed. Reg. 63026 (1980); *1979 Cable Royalty Distribution Determination*, 47 Fed. Reg. 9879 (1982), *appeal docketed sub nom. Christian Broadcasting Network v. Copyright Royalty Tribunal*, Nos. 82-1312 *et al.* (D.C. Cir. Mar. 24, 1982).

subverting them. In fact, had the Court of Appeals reached the opposite result and denied EMI the benefit of Section 111(a)(3)'s carrier exemption, then copyright owners would have reaped unintended advantages: ironclad blackout rights (the right to refuse to bargain for realistic royalty rates) and double royalty payments (from carriers and from the cable systems) for the same secondary transmission. This windfall would be expressly contrary to Congress' intent in creating the compulsory licensing scheme. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). A copyright owner's right to prevent cable retransmission of television programming would, in effect, have resuscitated the system of "retransmission consent" that Congress explicitly rejected. *See Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1146-1147 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

II. The Court Of Appeals Correctly Interpreted The Copyright Act's Carrier Exemption

Doubleday urges this Court to review whether EMI "selected" the signal of WOR-TV for retransmission and whether EMI's normal business and promotional activities constitute more than provision of a channel of communication under Section 111(a)(3). However, these issues were fairly resolved by the Court of Appeals and do not merit further review.

The critical phrase in Section 111(a)(3), for purposes of this case, is: "any carrier who has no direct or indirect control over the content or selection of the primary transmission." Doubleday asserts that EMI "selects" WOR-TV to be carried to cable systems, and so voids the exemption. Petition at 8-10.

"[C]ontrol over the content or selection of the primary transmission" is, due to its grammar, susceptible of various meanings. If a cable system chooses to offer WOR-TV when a carrier transports the signal to the cable headend, which party actually "selects" the station? The answer cannot be found in the uncertain structure of Section 111(a)(3) alone, so resort must be had to legislative history.

The sources cited by Doubleday (Petition at 9-10), including Professor Walter J. Derenberg's letter to Herbert Fuchs, Pet. App. 56a-64a, relevant House and Senate Reports,

and subsequent draft revisions of the Act, were all analyzed by the Court of Appeals. The Court of Appeals concluded that Section 111(a)(3) was designed to distinguish between carriers such as phone companies, which provide cable systems with distant television signals, and cable systems, which deliver the signals directly to the public. (Professor Derenberg uses the term "patron.") The cable operator bears copyright liability because he is the one offering the service—selecting which signals will be provided—directly to the public. Unless an entity is dealing directly with such patrons, it is an intermediary, entitled (like the telephone company in Professor Derenberg's example) to the exemption so long as it performs only as a conduit, without altering the primary transmission (the distant television signal). *Accord, WGN Continental Broadcasting Company v. United Video, Inc.*, 685 F.2d 218 (7th Cir. 1982). *See Opinion*, 691 F.2d at 132 n.16 (Pet. App. 14a-15a).

The Court of Appeals' careful analysis of the Act applies this common-sense distinction to EMI's operation. *Opinion*, 691 F.2d at 130-131 (Pet. App. 11a-12a). EMI is not a telephone company, but it is a conduit, providing an unaltered distant television signal to cable systems that select WOR-TV as part of their service to the public. EMI does not deal with the systems' patrons. It delivers WOR-TV only because the signal is used by cable systems, again in accord with Professor Derenberg's example. Therefore, within the meaning of Section 111(a)(3), EMI does not control the content nor selection of the signal, and the exemption is properly applied to EMI.

The use of legislative history to illuminate the meaning of Section 111(a)(3) is necessary precisely because "words of general meaning" in a statute take on a particular meaning in the context "of the circumstances surrounding [the statute's] enactment, or of the absurd results which follow from giving such broad meaning to the words." *Church of The Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). *Accord, United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940). Unlike the District Court's opinion,[9] the

[9] The District Court's ruling interpreted the exemption under Section 111(a)(3) without once mentioning the painstakingly-crafted compulsory licensing scheme of the Act.

Court of Appeals' decision implements the statute's " 'purpose or object.' " *Watt v. Alaska,* 451 U.S. 259, 266 (1981) (quoting *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404 (1945)).

Doubleday claims this result is "anomalous." Petition at 10. In fact, the opposite is true. Under the Act, copyright owners are compensated for cable carriage from fees paid by cable systems. Delivery to cable viewers is the basis for the rates. Congress intended precisely this result, just as it aimed to deny copyright holders any control over the cable carriage of their televised material.

In sum, this case presents no important federal issue which requires resolution by this Court. The issue is a narrow one which, having been properly resolved, allows the compulsory licensing scheme of the Act to operate as intended by Congress. Copyright owners will be adequately compensated, cable systems will have programming available for delivery to subscribers, and carriers will continue to perform their intermediary role.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Dated: January 7, 1983

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CERTIFICATE OF SERVICE

In accordance with Rules 22.1 and 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were delivered by hand to the following counsel for the Petitioner on this 7th day of January, 1983.

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